



July 2, 1999

Ms. Linda Wiegman
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR99-1845

Dear Ms. Wiegman:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 125329.

The Texas Department of Health (the "department") received a request for a record of the January 15, 1999 survey of St. David's Psychiatric Pavilion ("St. David's") and the "[a]ge, sex, and number of days post ECT of the patient who died on November 14, 1998." You have marked the records and assert that portions are confidential under various provisions of the law in conjunction with section 552.101 of the Government Code, which protects from disclosure under the Public Information Act material that is otherwise made confidential.

You assert that the identities of these patients and identifying information about patients which is contained in records obtained from St. David's are protected from disclosure under section 576.005 of the Health and Safety Code, which provides: "Records of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential unless disclosure is permitted by other state law." We agree that the documents you marked as being records from St. David's contain information that directly or indirectly identifies patients of St. David's and thus must be withheld from disclosure.

You assert that identities of patients and their families in other documents are protected from disclosure under section 552.101 of the Government Code as it encompasses a right of privacy. Information must be withheld from public disclosure under a common-law right of privacy when the information is (1) highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 at 1 (1992). The type of information the supreme court considered intimate and embarrassing in *Industrial Foundation* included information relating to psychiatric treatment

of mental disorders. In Open Records Decision No. 262 (1980), this office stated that information about a patient's injury or illness might be protected under common-law privacy if such injury or illness relates to drug overdoses, acute alcohol intoxication, gynecological or obstetrical illnesses, convulsions and seizures, or emotional and mental distress. *See also* Open Records Decision No. 539 at 5 (1990) (information concerning emotional state may be protected by common-law privacy). However, an individual's right of common-law privacy is a personal right that does not extend past that individual's own death. Attorney General Opinion H-917 (1976); Open Records Decision No. 272 at 1 (1981). Thus, you must withhold identifying information including names, addresses, and patient numbers of patients at St. David's on the basis of common-law privacy, except for patients who are deceased. Common-law privacy will not generally protect the records of those patients. We also have marked a small amount of financial information that must be withheld to protect the common-law privacy of third parties.

You assert that the social security numbers listed in the documents are protected from disclosure under section 552.101 of the Government Code in conjunction with 42 U.S.C. § 405(c)(2)(C)(viii)(I). When social security numbers are obtained or maintained by a governmental body pursuant to any provision of law, enacted on or after October 1, 1990, they are confidential pursuant to section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. Open Records Decision No. 622 (1994). As you have shown that the social security numbers at issue were obtained or maintained pursuant to a law enacted after October 1, 1990, we agree that the numbers are confidential by law.

You also assert that the records are confidential under chapter 611 of the Health and Safety Code and article 4495b of Vernon's Texas Civil Statutes. Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990).

Section 5.08 of V.T.C.S. article 4495b, the Medical Practice Act (the "MPA"), provides:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Access to medical records is not governed by chapter 552 of the Government Code, but rather provisions of the MPA. Open Records Decision No. 598 (1991). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* V.T.C.S. art. 4495b, § 5.08(a), (b), (c), (j); Open Records Decision No. 598 (1991). We have marked the records to indicate what portions are protected under the MPA and chapter 611.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ruth H. Soucy', with a stylized flourish at the end.

Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref: ID# 125329

Encl. Marked documents

cc: Mr. Andrew Prough
Citizens Commission on Human Rights
711 West 7th Street, Suite 110
Austin, Texas 78701
(w/o enclosures)